more complete study of the frequent changes in the law which are constantly being made by the general assembly.

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IS THE MILK BUSINESS AFFECTED WITH A PUBLIC INTEREST?

On June 22, 1933, Governor George White of Ohio approved the Milk Marketing Act, establishing a Milk Marketing Commission to regulate the production, and distribution of bottled milk in Ohio. (115 Ohio Laws, page 288, Section 1080, 1-23, Ohio General Code). This Act has been upheld in a recent Cuyahoga Court of Appeals decision, *Clover Meadow Creamery Co. vs. National Dairy Products Corp.* 40 O. L. R. 57, decided March 26, 1934. In the above case, the defendant sought to have dissolved an injunction restraining it from continuing unfair business practices in the sale and distribution of milk. The defendant contended that the questions of monopolistic control, unfair competition, and price fixing are for the newly created Milk Marketing Commission to decide. The court of appeals dissolved the injunction, and declared the Milk Marketing Act constitutional. The dissolution of the injunction by the court, on the ground that the commission was the proper body of first instance, upheld the power granted the commission to decide all issues arising out of the milk industry. However, if a person or corporation, who is a party to a complaint filed with the commission, is dissatisfied with the commission's ruling, he may by a petition in error proceed to the Common Pleas court of any county in Ohio. (Section 1080-10, General Code).

The Ohio Milk Law was passed as emergency legislation and is to expire July, 1935, if not renewed. The Ohio Act is similar to the New York Milk Control Act. (Article 25, 300-319, New York Laws 1933). The New York Act expired March 31, 1934, and has been renewed. The only difference in the Acts of N. Y. and Ohio, is that the New York Board of Control had regulatory power over the entire dairy industry, while the Ohio act is limited to the regulation of bottled milk.

The question arises as to the constitutionality of the price fixing power granted to the commissions by legislation in New York and Ohio. *The Clover Meadow Creamery Co. v. National Dairy Products*, supra, was the first case in Ohio where the court upheld the regulatory feature of the Ohio Milk Marketing Act, regulating trade practices. Price fixing power was not involved, as this point was not raised. The question now arises, if the commission can regulate monopolistic control, and unfair practices, can it also fix prices of milk to be paid the producer, and the price to be paid by the consumer?

The decision that led the Cuyahoga Court of Appeals to declare the Milk Marketing Act of Ohio constitutional was *Nebbia v. New York* 291 U. S. 502, 54-Sup. Ct. 505. The Nebbia Case was decided March 5, 1934. It was only three weeks after the United States Supreme Court declared the

New York Act constitutional, that the Cuyahoga Courts of Appeals handed down its decision upholding the Ohio milk legislation.

The Nebbia Case upheld the New York legislation fixing the retail price of milk. The Court said that the milk industry in New York was an industry affecting the safety, health, and public welfare of the people, that the state could regulate the prices of milk. The Nebbia Case was approved in a recent U. S. Supreme Court decision, *Hegeman Farms Corp. v. Baldwin*, Law Week Nov. 6, 1934, page 10, in which the power of the commission to fix the prices to be paid to the producer was sustained.

In recent N. Y. cases decided in 1934, contesting the validity of the N. Y. Board of Control Act, questions have arisen which have not yet been in issue under the Ohio Law. The courts have upheld the following powers: 1. To fix prices to be paid by the consumer; 2. To fix prices to be paid to the producer; 3. To allow the Board to investigate any dairy's operations; 4. To revoke licenses for unfair trade practices; 5. To allow "unadvertised" milk to be sold for one cent less than advertised brands.

But on the other hand the Board has been denied the power to regulate the price to be paid an out-of-state producer for the raw milk. *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. R. 505. 78 L. ed. 563, 89 A. L. R. 1469; *Matter of Ideal Farms, Inc. v. Baldwin*, 149 Misc. 902, 262 N. Y. S. 467; *Hegeman Farms Corp. v. Baldwin*, 6 F. Supp. 297; 293 U. S. ——; supra; *Matter of Bridgeville Farms, Inc. v. Baldwin*, 241 App. Div. 781, 270 N. Y. S. 1005; *New York Evening Post v. Baldwin*, N. Y. L. J., June 13, 1934; *Borden's Farm Products Corp. v. Baldwin*, 7 F. Supp. 352.

G. A. F. Seelig, Inc. v. Baldwin, 7 F. Supp. 776; *Baldwin v. Califon Farms, Inc.*, N. Y. L. J., Sept. 6, 1934; *Matter of Eisenberg Farms, Inc. v. Baldwin*, 243 App. Div.—mem.; *Matter of Muller Dairies, Inc. v. Baldwin* 243 App. Div.—; *Matter of Muller Dairies, Inc. v. Baldwin*, 244 App. Div. —mem.

Section 300 of the N. Y. Milk Law and Section 1080-2, Ohio General Code, have stated that a continuing evil was becoming imbedded in the milk industry prior to this legislation. "Inquiries have disclosed destructive and demoralizing competition, and unfair trade practices, which have resulted in retail price cutting, and reduced income of the farmer below the cost of production." (Quoted from majority opinion in the Nebbia case, supra, page 516). The Ohio Legislature found conditions in Ohio so demoralizing that, in Section 1080-2 General Code, it expressly states, "The production, processing, distribution, and sale of milk in this state as a whole, and each of the said activities or operations, separately, is hereby declared to be a business charged with a public interest."

To justify the state's creation of boards regulating the milk business, it must be shown that this does not deny anyone due process or equal protection of the laws.

It is submitted that fixing minimum prices for milk during the present emergency, declared by the legislature, is a valid exercise of the police power, and does not deny anyone due process. The Supreme Court of the United States had sustained far greater infringements on the rights of contract in emergencies which were less stringent in their economic aspect, than the present milk emergency. In *Home Building & Loan Ass'n. v. Blaisdell*, 290

U. S. 398, 54 Sup. Ct. R. 23 (1934). The Supreme Court upheld the Minnesota Mortgage Moratorium, by extending the time allowed by existing law for redeeming real property from foreclosure and sale under existing mortgages. In *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. R. 298 (1917), the court upheld the act of Congress fixing hours and wages of railroad employees in interstate commerce, when a national strike was threatened.

The Supreme Court upheld New York's housing law during the period following the World War, when an emergency was created due to the shortage of dwellings. In *Brown Holding Co. v. Feldman*, 256 U. S. 170, 41 Sup. Ct. R. 465, (1921) followed by *Levy Leasing Co. v. Seigal*, 258 U. S. 242, 42 Sup. Ct. R. 269 (1922). *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. R. 458, (1921), the court upheld an Act of Congress fixing rents for dwellings, similar to the N. Y. Housing Laws. The court said in the latter case, "A public exigency will justify the legislature in restricing property rights in land to a certain extent without compensation." The court in *Chicago, M. St. P. Ry Co. v. Hedges*, 5 Fed. Supp. 752, (1933), laid down the rule that, "Laws are merely rules of civil conduct for common good and must be considered in somewhat the same relation as civil contracts in times of stress and emergency for common welfare, and in such emergency constitutional limitations are elastic to the exercise of legislative powers to avoid domestic confusion, social disruption, or economic chaos."

Even without the existence of an emergency, the court still would have had enough precedent to uphold the milk legislation in New York. In 1877, in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, it was held that grain elevators were so affected with the public interest, that storage rates could be regulated. In *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. R. 857, (1894), the court approved similar regulation of grain elevators in North Dakota. A Kansas statute fixing the amount of premiums for fire insurance was held not to deny due process. *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. R. 612, (1914). In *Schmidinger v. Chicago*, 226 U. S. 578, 33 Sup. Ct. R.-182 (1913), and *Petersen Baking Co. v. Bryan*, 290 U. S. 570, 54 Sup. Ct. R. 277, (1934), regulation of the size of a loaf of bread was held constitutional.

It has been established throughout the country, that where a business is a public utility, or has been held a business affected with a public interest, it becomes subject to regulation and price fixing, as in cases of gas, electric, water, street railways, and railroad companies. American Digest,—Public Service Commissions Key No. 7; Constitutional Law Key No. 135; and Century Digest, Sections 380-387.

Many other decisions have shown that the private character of a business does not necessarily remove it from the class of businesses subject to regulation, and price charges. *Griffith v. Conn.*, 218 U. S. 563, 31 Sup. Ct. R. 132, (1910); *O'Gorman v. Young*, 282 U. S. 251, *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. R. 30, (1901), and *Stephenson v. Binford*, 287 U. S. 251, 53 Sup. Ct. R. 181, (1932).

Before the milk legislation, New York and Ohio were having great difficulty coping with the evils which resulted directly from milk price wars, and the low returns to the producer. In fact in many parts of the country, the farmers had struck and refused to ship milk, and also prevented other

farmers from shipping milk, thereby causing a shortage of milk to the consumers.

In order to insure a daily supply of milk to the consumers it was essential that the farmers be guaranteed a profit on their investment and labor. The following states have established boards similar to the Ohio Milk Marketing Commission to remedy the situation which has resulted from cut throat competition in the milk business; Vermont (Act Special sessions No. 8, 1933 Vt.); New York (Chapter 158, Section 302); New Jersey (Chapter 169, Laws of 1933); Conn. (Chapter 135, Laws of 1931); Pennsylvania (No. 57, 1933 Laws); California (Chapter 25, 1933); and Virginia (Chapter 357, 1934, Acts of Assembly).

Justices Butler, Sutherland, McReynolds, and Van Devanter, in their dissent in the *Nebbia Case*, supra., disapproved price regulation in the milk business, claiming that the dairyman's business is essentially private. For this position they cite a dictum in *New State Ice Co. v. Liebman*, 285 U. S. 262, 52 Sup. Ct. R. 371, (1932). Their theory of economics is one of laissez faire, and they back their contentions with many decisions, claiming that due process under the Fourteenth Amendment means right to contract free and unhampered by unreasonable legislation. Chief among these decisions are *Tyson Bros. v. Banton*, 273 U. S. 418, 47 Sup. Ct. R. 426, (1927), in which the court held invalid a law regulating the resale of theater tickets. *Ribnik v. McBride*, 277 U. S. 250, 48 Sup. Ct. R. 545, (1927), in which state regulation of private employment agencies was held invalid; *Meyer v. Nebraska*, 262 U. S. 390, 43 Sup. Ct. R. 625 (1923), in which the court held invalid a statute which forebade teaching in public schools any language other than English; *Near v. Minnesota*, 283 U. S., 51 Sup. Ct. R. 625, (1931), in which a Minnesota statute designed to protect the public against obvious evils incident to the business of regularly publishing malicious, scandalous, and defamatory matters was held unconstitutional; *Fairmount Creamery v. Minnesota*, 274 U. S. 1, 47 Sup. Ct. R. 506 (1927), in which it was held that the state could not fix prices for purchase of dairy products for manufacture and sale. Other cases which the dissenting justices stated as precedents for their doctrine were: *U. S. v. Cohen Grocery Co.*, 255 U. S. 81, 41 Sup. Ct. R. 298, (1921); *Wolf Packing Co. v. Industrial Court*, 262 U. S. 522, 43 Sup. Ct. R. 630 (1913), and *Williams v. Standard Oil Co.*, 278 U. S. 235, 49 Sup. Ct. R.. 115, (1929).

The dissenting justices in the *Nebbia Case*, supra., do not find any evil in the milk business to be corrected and continued to uphold the doctrine of almost absolute liberty of contract. This is in spite of the fact that at least 6 states have realized the need for regulating the milk business in their respective states. The Court of Appeals of Virginia has held legislation similar to New York and Ohio unconstitutional. Nov. 25, 1934.—N. Y. Times.

This legislation is primarily to benefit the farmer. The Ohio Act provides for a combination of producers and distributors to set fair prices, which will insure the farmer a fair return for his labor and investment. It is through this method of price control that the people of Ohio are guaranteed a regular supply of milk at reasonable prices, and the producers are given a profit on their labor and investment.

The only question remaining is what will the Supreme Court of Ohio,

and later the Supreme Court of the U. S. do if and when the price fixing feature of the Ohio Milk Marketing Act is tested? According to decisions rendered in the Nebbia Case, supra, and Hegeman v. Baldwin, supra., it seems that the decision in the Cuyahoga County Court of Appeals upholding the regulatory feature of the Ohio Act will be affirmed in the higher courts, and the price fixing feature will also be upheld.

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STATE MORATORY LEGISLATION

Among the deleterious results of the economic cataclysm of 1929, were the hysterical desire of mortgagors to liquidate their debts and the falling of property values. To the debtor the situation was most oppressive. To him it meant that if prices and values fell 50 per cent, the burden of the repayment of his debts was increased 50 per cent. To the creditor it meant securing dollars in payment that would now buy twice as much in commodities. It is the plight of the mortgagor as a debtor with which we are here concerned. His property was mortgaged to the limit. His outstanding indebtedness was in many cases as large as the appraised value of the property. The mortgagor had three ways of attacking his problem; he might assign his property to the mortgagee, refinance his indebtedness, or allow the property to go by foreclosure. The first two possibilities were often unavailable or inexpedient and too often foreclosure was the inevitable outcome. But the pathetic aspect of the mortgage situation was that at the foreclosure sale, so little was secured that the result was a deficiency judgment hurdled upon the mortgagor. The greatest factor contributing to this desperate situation was the fact that there was no market for real estate. The market had completely disappeared. It was this breakdown of the functioning of our economic system that rendered impossible the fulfillment of mortgage contracts. Under these circumstances our court procedure was ill equipped to meet the crisis. Our mortgage laws ignored economic forces—fluctuations in price and property values.

It is estimated that the total mortgage indebtedness of the country centers about 45 billion dollars, 9 billions of which is on farm mortgages, 21 billions on urban house mortgages, and 15 billions on big building mortgages.[1] Foreclosures during the first five months of this year were three times what they were the whole year of 1926.[2] In the State of Ohio alone, during the first six months of this year we have had 1031 complete foreclosure actions involving judgments totalling over 5 million dollars.[3] That some form of relief for the overburdéned debtor became necessary cannot be doubted in view of the crisis. The mortgagors raised their voices to the legislature to recognize human values even at the cost of going to the "verge of the law."

[1] Business Week, October 27, 1934, page 6.
[2] Business Week, July, 1934, page 10.
[3] See report compiled by the department of Rural Economics of the State of Ohio and Ohio State University entitled, Report on Foreclosures, Summary of Year ending June 30, 1934.